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Supreme Court, U.S.
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No. (1) 071520

In The

Supreme Court of the United States

CHEN XIANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did petitioner receive ineffective assistance of counsel by reason of the failure to argue that there was no evidence that any charged robbery affected interstate commerce?

2. Were the consecutive and enhanced penalties for the weapons offenses charged in Counts Six, Nine and Twelve improper?

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OPINION BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit, dated March 11, 2008, is submitted herewith.

JURISDICTION

This matter is On Writ of Certiorari to the United States Court of Appeals for the Second Circuit. The Judgment of that Court was entered March 11, 2008.

The statutory provision conferring upon this Court jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C.A. sec. 1254.

CONSTITUTIONAL & STATUTORY PROVISIONS

1. Petitioner was denied Due Process of Law pursuant to the dictates of the Fifth Amendment to the United States Constitution which states in relevant part:

> "No person shall be held to answer . . . , nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution provides in relevant part:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."

STATEMENT OF THE CASE

This matter was on direct appeal to the United States Court of Appeals for the Second Circuit from a Judgment of the United States District Court for the Southern District of New York (Casey, J.). The District Court Judgment was entered on or about October 13, 2006. The Summary Order of the Court of Appeals affirming the conviction was filed on March 11, 2008, and the Mandate was issued on April 2, 2008.

Petitioner was originally convicted following a jury trial. Petitioner's conviction on Counts I of the Indictment [extortion conspiracy], II [extortion], and III [firearm in connection with extortion] were reversed by the Second Circuit Court of Appeals in a decision dated November 1, 2005 [03-1575(L)]. As a result of said Decision, defendant's original sentence of 70 months on Counts I, II, IV, V, VII, VIII, X, XI [each sentence on each count to run concurrently to the other], plus the consecutive total imprisonment term of 984 months for Counts III, VI, IX and XII (weapons), was effectively reduced to a sentence of

70 months imprisonment, plus 684 months imprisonment for the weapons counts. Pursuant to the Court of Appeals decisions, Counts IV, V, VII, VIII, X, XI, and Counts VI, IX and XII were remanded to the District Court for resentencing pursuant to *United States v. Booker*, 125 S.Ct. 738 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

On October 13, 2006, petitioner was resentenced, and District Judge Casey again found petitioner's base offense level for the non-weapon Counts (Counts 4,5,7,8,10,11) to be 24, at criminal history III (63-78 months incarceration). After considering the sentencing factors stated in 18 USC § 3553(a), Judge Casey did not disturb the original sentence of 70 months imprisonment, and 3 years supervised release, but ran said term concurrent to the sentence imposed before Southern District Judge Kaplan in 02 Cr 300, and a New York State sentence. Judge Casey also imposed a related $600 special assessment. Judge Casey then imposed mandatory consecutive sentences of 84 months on Count 6; 300 months on Count 9; 300 months on Count 12; for a total case punishment of 754 months. Judge Casey also imposed a $300 Special Assessment for said weapons counts.

According to the Government's evidence, at 75 Eldridge Street in New York City, an unknown caller telephoned Mr. Hua, a part owner in a gambling operation at that location. The caller stated he was associated with "Vietnamese Boy" [codefendant and cooperating witness "Xiao"]. The caller stated Vietnamese Boy would come to the gambling parlor later

that day to pick up $10,000, which Hua was instructed to place in a red envelope. That evening Hua was summoned to go outside the gambling parlor by a group of men. The group allegedly included petitioner, and defendants Lin, Xiao and Wei. Each of the four pointed guns at Hua, but Hua told the group he had no money. Xiao allegedly struck Hua on the head, and Wei struck Hua in the stomach using Wei's gun. Xiao ripped a necklace from Hua's neck, and the group fled.

On September 30, 2001, Xiao, co-defendant Ye, and petitioner allegedly robbed a gambling parlor located in the rear of a barbershop at 21 Eldridge Street using weapons. The group took more than $10,000 in the robbery.

On November 21, 2001, Defendants Lin, Xiao, Chun Chen, Gau, and petitioner, allegedly attempted to rob a gambling parlor at 75 Eldridge Street, but could not gain entry. Later on November 21st, 3 of the same group entered, and robbed a gambling parlor at 109th East Broadway. However, the $3000 proceeds from that robbery were split amongst original 5 members of said group.

On January 23, 2002, Xiao, Li, and petitioner allegedly robbed a gambling parlor in the rear of a barbershop at 85 Allen Street. Guns were brandished, and approximately $10,000 was stolen. Li struck one of the victims in the head with a pistol.

At petitioner's trial the guilty plea transcript of defendant Li Wei was admitted as evidence to prove

the Count One extortion conspiracy. The Government's other trial evidence included victims of the crimes charged, law enforcement case investigators, weapons evidence seized from the apartment of a co-conspirator, and the testimony of cooperating witnesses Xiao, Ye, and Chun Chen.

Instant petitioner appealed the jury verdict and his sentence [03-1575-L]. Over petitioner's objection, his appellate counsel, who was also trial counsel, raised limited issues on direct appeal. Counsel challenged the introduction of other crimes evidence pursuant to Evidence Rule 403; the violation of the Confrontation Clause by the admission of the guilty plea transcript of defendant Wei; the insufficiency of the evidence on the extortion Counts [Counts One and Two]; and the necessary dismissal of the Count Three weapon offense – for using a firearm in connection with extortion related crimes – because of that insufficiency; and the fundamental unfairness of sentencing petitioner to 300 months consecutive incarceration on each of Counts 9 and 12, when the conviction for each of the three weapons counts took place in the context of the same trial [*Deal v. United States*, 508 U.S. 129 (1993)].

REASONS FOR GRANTING THE WRIT

REASON ONE: Petitioner received ineffective assistance of counsel by reason of the failure to argue

that there was no evidence that any charged robbery affected interstate commerce?

The Sixth Amendment to the United States Constitution provides for an accused's right to counsel:

> "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The right to such assistance in a criminal prosecution means the right to assistance at every stage of the proceeding. *United States v. Harrison*, 451 F.2d 1013 (2d Cir. 1971); *Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1968); *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964). That right is amplified by Rule 44 of the Federal Rules of Criminal Procedure which states in section "(a)" thereof:

> "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent that defendant at every stage of the proceedings from initial appearance before the federal magistrate or the court through appeal, unless the defendant waives such appointment."

The importance of the Sixth Amendment right to counsel is highlighted by decisions in *Argersinger v. Hamlin*, 407 U.S. 25, 31-36 (1972), and *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963). The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard with the assistance of counsel. A defendant requires the

guiding hand of counsel at every step in the proceeding against him. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Like all constitutional guarantees, the right to counsel is more than an illusory promise; it is the right to the effective assistance of counsel. See, e.g., *Gaines v. Hopkins*, 575 F.2d 1147 (5th Cir. 1978) [failure of court appointed attorney to investigate the defendant's case deprived defendant of effective assistance of counsel]; *McKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960) modified, 289 F.2d 928, cert. denied, 368 U.S. 877 (1961) [failure of court appointed attorney to interrogate witnesses and assure presence of witnesses at trial deprived defendant of effective assistance of counsel]. The standard for deciding whether a claim of ineffective assistance of counsel amounts to constitutional deprivations, is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. It is whether the deficient performance of counsel prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cruz*, 785 F.2d 399 (2d Cir. 1986). A defendant must show that counsel's performance was deficient, and that deficient performance prejudiced the defense. *Maddox v. Lord*, 818 F.2d 1058 (2d Cir. 1987); *Cuevas v. Henderson*, 801 F.2d 586 (2d Cir. 1986), cert. denied, 107 S.Ct. 1354 (1986); *Valdez v. Scully*, 627 F. Supp. 714 (SDNY 1986). "Prejudice" is defined as an error that works to the actual and substantial disadvantage of a party, infecting the entire proceeding

with error of constitutional magnitude. *United States v. Frady*, 456 U.S. 152 (1982).

Conversely, effective assistance of counsel as guaranteed by the Sixth Amendment, is that quality of representation within the range of competence reasonably expected of attorneys in criminal cases. *United States v. Dukes*, 727 F.2d 34 (2d Cir. 1984).

The same standard is used to evaluate the effectiveness of both trial and appellate counsel. See, *Smith v. Murray*, 477 U.S. 527, 536 (1986).

Petitioner recognizes that the Supreme Court in *Massaro v. United States*, 538 U.S. 500 (2003) stated its preference for raising ineffective assistance of counsel claims by Section 2255 motions. However, petitioner believes a sufficient record here exists to now decide the issue.

On appeal, and at trial petitioner urged his attorney to move to dismiss the convictions of the three gambling parlor robbery Counts on the ground that the interstate commerce element required for a Hobbs Act robbery, was not satisfied for any incident. The Eldridge Street robbery proceeds from individuals did not exceed $10,000; the Allen Street robbery proceeds from individuals did not exceed $10,000; the 109 East Broadway robbery proceeds from individuals did not exceed $3000. The criminal purpose of each robbery was to target individuals at an illegal gambling parlor, not a business engaged in interstate commerce. In the course of each robbery the money taken from numerous individuals was not substantial

enough to have a cumulative effect upon interstate commerce. The case law on the issue is clear that there must be facts which demonstrate that the funds taken from an individual were to be used in a business operating in interstate commerce. The test was stated in *United States v. Collins*, 40 F.3d 95 (CA5 1994), and *United States v. Alfonso*, 1998 U.S. Dist. LEXIS 169. The application of the Hobbs Act to crimes committed against individuals will only stand if the act depletes the assets of an individual who is directly and customarily engaged in interstate commerce; if the acts cause or create the likelihood that the individual will deplete the assets of an entity engaged in interstate commerce; or if the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce.

The federal government bears the onus of proving that the accused's conduct affected interstate commerce. It is this proof that differentiates Hobbs Act violations from common law robbery. *United States v. Peterson*, 236 F.3d 848 (CA7 2001). Here, there was no evidence presented by the Government linking any charged robbery to interstate commerce. At oral argument the Court of Appeals belittled the Government's contention of a such a link. Yet, in the Summary Order the Court of Appeals found there was sufficient evidence that "each of the three robberies affected, or had the potential to affect, interstate commerce." That conclusion is not supported by the

barren trial record, and is further without a single supporting factual reference in the Summary Order.

When the Government seeks to satisfy the jurisdictional Hobbs Act's requirement by showing a connection between an individual victim and a business engaged in interstate commerce, the connection must be a substantial one, not one that is fortuitous or speculative. *United States v. Turner*, 272 F.3d 380 (6th Cir. 2001). While the effect on interstate commerce need only be minimal, *United States v. Jamison*, 299 F.3d 114 (2d Cir. 2002), merely showing a victim of a conspiracy worked at a business engaged in interstate commerce is not enough to meet the de minimis showing required to support a federal conviction. *United States v. Perrotta*, 313 F.3d 33 (2d Cir. 2002).

The attorney was constitutionally ineffective for not moving to dismiss the weapons charges contained in Counts Six, Nine and Twelve of the Indictment on the ground that the three robberies were not Hobbs Act robberies, as stated aforesaid, that could be prosecuted in a court of the United States as required by 18 USC § 924(c)(1)(A).

As was stated by the Court of Appeals in petitioner's original appeal [03-1575(L)], in dismissing the § 924(c) weapon offense charged in Count Three, for failure to prove the predicate extortion-related crimes:

> "Indeed, because the commission of the underlying predicate offense is a necessary

> element of a conviction under §924(c), both logic and precedent dictate that there must be legally sufficient proof of the underlying offense. . . . Without such proof, the third element of §924(c) simply has not been established, and a conviction under the statute cannot be sustained."

Here, the robberies of individuals at the 3 illegal gambling locations did not effect interstate commerce, and the related weapons offenses in Counts Six, Nine and Twelve should have been dismissed either in the District Court, or by order of the Court of Appeals on direct appeal. The failure petitioner's then attorney to raise this issue at any stage of the proceeding is ineffective assistance of counsel. Petitioner was obviously prejudiced as the result because he was sentenced to 684 extra months in prison as the direct result of the ineffective assistance.

REASON TWO: Petitioner was not convicted by this jury of a second, or subsequent weapons offense, and the enhancement provision of § 924(c) is fundamentally unfair, and cruel.

On October 13, 2006, petitioner was resentenced, and District Judge Casey again concluded petitioner's base offense level for the non-weapon Counts (4,5,7,8,10,11) to be 24, at criminal history III (63-78 months incarceration). After considering the sentencing factors stated in 18 USC § 3553(a), Judge Casey did not disturb the original sentence of 70 months in prison, 3 years supervised release, but ran said term concurrent to the sentence imposed before Southern

District Judge Kaplan in 02 Cr 300, and a New York State sentence. Judge Casey also imposed a related $600 special assessment. Judge Casey then imposed mandatory consecutive sentences of 84 months on Count 6; 300 months on Count 9; 300 months on Count 12; for a total case punishment of 754 months. Judge Casey also imposed a $300 Special Assessment for said weapons counts.

Petitioner was sentenced to 684 months incarceration for weapons convictions by the jury for Counts 6, 9 and 12 rendered at the conclusion of his trial.

18 USC § 924(c) states as follows:

> "Any person who, during and in relation to any crime of violence . . . uses or carries a firearm . . . , shall, in addition to the punishment provided for such crim of violence . . . , be sentenced to a term of imprisonment of not less than 5 years [not less than 7 years if the firearm is brandished]. . . . In the case of a second or subsequent conviction under this subsection, the person shall be sentenced to a term of imprisonment not less than 25 years. . . .

At sentencing, and resentencing the District Court held that the weapons conviction for Counts 9 and 12 were "second or subsequent" convictions under 18 USC § 924(c) and imposed two 25 year consecutive terms of incarceration, to run consecutive to Count 6, and all other counts.

In *Deal v. United States*, 508 U.S. 129, 132 (1993) the majority held "the provision [of 18 USC 924(c)] also cannot be read to impose an enhanced sentence only for an offense committed after a previous sentence has become final. *Deal v. United States*, 508 U.S. at 129. Therefore, the statute "does not require a criminal act after the first conviction; it merely requires a conviction after the first conviction.

Petitioner believes *Deal*, ibid. was decided by the majority in error. Petitioner submits that the dissenters were correct that the construction of § 924(c) was sufficiently uncertain that the rule of lenity should apply, and that the statute should be construed to define a "subsequent conviction" as a conviction for an offense committed after and earlier conviction had become final. However, petitioner also submits he was convicted of Counts Six, Nine and Twelve simultaneously by the same jury at the same time. There is no order of conviction in the record, or interrogatory provided by the jury on the weapons counts in order to permit enhanced penalties for a second or subsequent conviction for a weapons offense. Counts Six, Nine and Twelve were rendered simultaneously by the jury. There is no weapon conviction after a conviction for a weapon offense.

Further, six hundred eighty four months imprisonment for the weapons counts is fundamentally unfair. The penalty is in excess of the penalties for airplane hijacking, espionage, kidnapping, assault, and rape. An effective life sentence for possession of a weapon on 3 occasions is "unjust, cruel and even

irrational" when the weapon was never discharged. See, *United States v. Angelos*, 354 F. Supp.2d 1227, 1230 (D.C. Utah 1994).

Imposition of a sentence of 684 months imprisonment for Counts Six, Nine and Twelve will not deter crime, it will only ruin the life of this 28 year old petitioner. See, *United States v. Jones*, 965 F.2d 1507, 1521 (CA8, 1992). The sentence is so irrational and draconian it can only encourage others to shoot their way out of a robbery, rather than leave witnesses.

CONCLUSION

For the foregoing reason a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

DATED: May 22, 2008.

Submitted by,

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212-334-3131

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Court of International Trade, at 1 Federal

Plaza, in the City of New York, on the 11th day of March, two thousand and eight.

PRESENT:

HON. SONIA SOTOMAYOR,
HON. REENA RAGGI,
Circuit Judges,
HON. CAROL BAGLEY AMON,
*District Judge.**

United States of America,

Appellee,

-v.-

Xiao Qin Zhou, Lin Li,
Chun Rong Chen,

Defendants,

Lin Xian Wu, Chen Xiang,

Defendants-Appellants.

No. 06-4544-cr(L)
No. 06-5091-cr (con)

(Filed Mar. 11, 2008)

For
Defendant-Appellant Wu: ANDREW G. PATEL, Law Offices of Andrew G. Patel, New York, New York.

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* The Honorable Carol Bagley Amon, District Judge, of the United States District Court for the Eastern District of New York, sitting by designation.

For
Defendant-Appellant Xiang: B. ALAN SEIDLER, New York, New York.

For Appellee: DIANE GUJARATI, Assistant United States Attorney, (Michael Garcia, United States Attorney for the Southern District of New York, Benjamin Gruenstein, Assistant United States Attorney, *on the brief*), New York, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Defendants-appellants Lin Xian Wu and Chen Xiang appeal amended judgments of conviction entered on September 15, 2006 and October 25, 2006, respectively, in the United States District Court for the Southern District of New York (Casey, J.), following convictions for three counts of robbery in violation of 18 U.S.C. § 1951, three counts of conspiracy to commit robbery in violation of § 1951, and three counts of using a firearm in connection with the robberies in violation of 18 U.S.C. § 924(c). Wu was principally sentenced to 51 months' imprisonment for the robbery and conspiracy to commit robbery convictions and 684 months' imprisonment for the firearms convictions. Xiang was principally sentenced to 70 months' imprisonment for the robbery and conspiracy

to commit robbery convictions and 684 months' imprisonment for the firearms convictions. The sentences for the firearm convictions are mandatory sentences. We assume the parties' familiarity with the underlying facts and procedural history of the case.

Wu contends that the mandatory sentence for his § 924(c) convictions is unconstitutional because it prevented the district court from considering his individual circumstances. Because Wu's mandatory minimum sentence of 684 months' imprisonment for conviction of three counts of § 924(c) is less than the statutory maximum sentence of life imprisonment for these convictions, *see United States v. Johnson,* 507 F.3d 793, 798 (2d Cir. 2007), this sentence is not unconstitutional. *Harris v. United States,* 536 U.S. 545 (2002) (upholding the constitutionality of mandatory minimum sentencing provision in § 924(c)); *see also Chapman v. United States,* 500 U.S. 453 (1991) (holding that a court may impose a statutory sentence unless it is cruel and unusual in violation of the Eighth Amendment or based on arbitrary classifications in violation of the Due Process Clause). Nor is the sentence unconstitutional because application of the mandatory minimum provision "narrow[s] the range within which a judge may exercise sentencing discretion." *United States v. Estrada,* 428 F.3d 387, 390 (2d Cir. 2005). Wu also argues that the mandatory minimum sentence violates 18 U.S.C. § 3553(a), by prohibiting the court from "impos[ing] a sentence sufficient, but not greater than necessary to comply

with the purposes set forth in paragraph (2) of this subsection." Although the sentencing court has limited authority to impose a sentence below a statutory minimum, *see*18 U.S.C. § 3553(e) & (f), its application of a statutory minimum sentencing provision is not substantively unreasonable in this case. *See Fernandez,* 443 F.3d at 26-27 (reviewing a district court's sentence for reasonableness). In addition, the record reflects that the district court considered the factors in § 3553(a) when sentencing Wu.

As an initial matter, Xiang argues that the mandatory minimum provision should not have applied in this case because he did not commit a criminal act after the first conviction. Xiang concedes that this argument is foreclosed by *Deal v. United States,* 508 U.S. 129, 135 (1993), but he raises it to preserve it. Xiang further argues that the sentence is substantively unreasonable. *See United States v. Fernandez,* 443 F.3d 19, 26 (2d Cir. 2006) (reviewing a district court's sentencing decision for reasonableness). To the extent Xiang challenges the reasonableness of the mandatory minimum sentence imposed pursuant to § 924(c), this claim is without merit for the reasons discussed above with respect to Wu's sentence. To the extent Xiang asserts that the sentence of 70 months' incarceration for the robbery and conspiracy to commit robbery convictions was unreasonable, we cannot conclude, giving due respect to the district court's reasoned judgment, that the sentence was an abuse of discretion given the nature and

seriousness of the offense. *See Gall v. United States*, 128 S. Ct. 586, 594-96 (2007).

Finally, Xiang argues that he received ineffective assistance of counsel on his merits appeal because counsel failed to challenge his convictions under the Hobbs Act for insufficiency of evidence regarding the interstate commerce element. At trial, the government provided evidence that each of the three robberies affected, or had the potential to affect, interstate commerce. *See United States v. Elias*, 285 F.3d 183, 188 (2d Cir. 2002). In addition, Xiang's appellate counsel was able to obtain a reversal of his conviction on three counts resulting in a reduction in his sentence of 25 years. Accordingly, we conclude that Xiang has failed to establish the elements of an ineffective assistance of counsel claim. *See Strickland v. Washington*, 466 U.S. 668, 688, 693-94 (1984) (holding that an appellant must show (i) that the attorney's performance fell below "an objective standard of reasonableness" under "prevailing professional norms," and (ii) "affirmatively prove prejudice" by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result fo the proceeding would have been different").